IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 31 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

RAMNIKLAL J KINARIWALA

Appearance:

MR MANISH R BHATT for Petitioner

MR SN SOPARKAR for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.S.SHAH

Date of decision: 18/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

At the instance of the Revenue, Income Tax Appellate Tribunal, Ahmedabad Bench 'A', has referred following three questions of law for our opinion in respect of Assessment Years 1982-83 & 1983-84 :

1. Whether, in law and on facts the Tribunal is right in directing the ITO to assess only 7.25% out of 12% share from the firm of M/s. Ramniklal J. Kinariwala in the hands of the assessee ?

2. Whether, in law and on the facts the Tribunal is right in deleting the income of the beneficiaries from the income of the assessee included under section 64(1)(i) of the I.T.Act ?

3. Whether, the Tribunal was right in law and on facts in not considering that in respect of the income of the wife who is the beneficiaries of the trust, the provisions of sec. 64(1)(iv) of the I.T. Act, 1961 were applicable ?

2. The assessee had transferred 4.75% out of his 12% share in the firm of M/s. Ramniklal J. Kinariwala to Dilip Jivanlal Kinariwala Trust of which one of the beneficiaries was the wife of the assessee. The Income-tax Officer, therefore, added the entire share income from the firm in the hands of the assessee. The I.T.O. added income of the beneficiary under section 64(1)(i) of the I.T.Act, 1961. In appeal, C.I.T.(Appeals) directed the I.T.O. not to assess that part of income in the firm in which he was a partner which was diverted by overriding title in favour of the trust. The CIT (A) also directed deletion of the income of the beneficiary included under section 64(1)(i). Thereupon, the Revenue approached the Tribunal. The Tribunal confirmed the view taken by the CIT (A) and while doing so, relied on its previous order dated March 14, 1990 rendered in the cases of Dilip J. Kinariwala and Sunil J. Kinariwala in ITA No. 683/2457/Ahd/86 and ITA No.684/2460/2461/Ahd/86. Reference Applications were submitted under section 256(1) of the Act and after hearing the learned counsel for the parties, the Tribunal has referred the above quoted questions of law for the opinion of this Court.

3. We have heard the learned counsel for the parties. The learned counsel for the parties state at

the Bar that Question no.1 referred to this Court for opinion is covered by the decision in SUNIL J. KINARIWALA v. COMMISSIONER OF INCOME-TAX, (1995)211 ITR 127. In the above quoted decision, this Court has held that income in respect of which liability to tax is attracted must be the real income of the taxpayer and not his artificial or notional income and in a case where the income of a taxpayer is required to be diverted even before it reaches him as a result of an overriding obligation, there would be neither accrual nor receipt of income which can be brought to tax in his hands. What is emphasised in the decision is that the income, in such a case, is taken away from him even before its accrual since it is already allocated for a particular purpose prior to its receipt, in his hands and, therefore, the taxpayer, even if he collects it, does so, not as a part of his income, but for and on behalf of the person to whom it is payable and such income is not subject to tax in his hands. The Division Bench has further held that when the assessee divests himself of the income producing apparatus or asset by overriding title created in favour of the beneficiaries of the trust, it is not necessary that the capital owned by the assessee be transferred and, therefore, section 60 would not be applicable to the facts of such a case. In view of the principles laid down in the above referred to decision, we are of the opinion that the Tribunal was right in directing the I.T.O. to assess only 7.25% out of 12% share from the firm of M/s. Ramniklal J. Kinariwala in the hands of the assessee. The first question is, therefore, answered in favour of the assessee and against the Revenue.

4. As far as Question no.2 is concerned, we find that the wife of the assessee is not one of the partners of M/s. Ramniklal J. Kinariwala and the beneficiaries have not derived directly any income by transfer of property belonging to the firm. The property is transferred to the trust which is a separate entity in the eye of law. Therefore, we are of the opinion that the Tribunal was right in deleting the income of the beneficiary from the income of the assessee included under section 64(1)(i) of the Act. In view of this, Questions no.2 & 3 are answered in favour of the assessee and against the Revenue.

The Reference accordingly stands disposed of, with no order as to costs.

(J.M.Panchal,J.) (M.S.Shah, J.)